Supreme Court, U.S.
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No. 98-1703

IN THE

Supreme Court of the United States

JOHN C. BRAZELL,

Petitioner,

v.

SAVANNAH ELECTRIC AND POWER COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court has jurisdiction over the instant petition inasmuch as said petition was not filed within 90 days of the date of the denial of the petition for rehearing in the Court of Appeals?

Whether the District Court and Court of Appeals correctly determined that Respondent was entitled to summary judgment on Petitioner's age discrimination claim where Petitioner failed to produce any relevant evidence from which a reasonable factfinder could conclude that Respondent's legitimate, nondiscriminatory reason for his July 31, 1996 discharge was a mere pretext for age discrimination?

Whether the District Court and Court of Appeals correctly determined that Respondent was entitled to summary judgment on Petitioner's Section 301 claim where Petitioner failed to produce any relevant evidence from which a reasonable factfinder could conclude that his collective bargaining agent breached its duty of fair representation?

PARTIES TO THE PROCEEDING

The parties to the proceeding include John C. Brazell, Petitioner, and Savannah Electric and Power Company, Respondent. In addition, the parent company of Respondent Savannah Electric and Power Company is the Southern Company headquartered in Atlanta, Georgia, and there are no other publicly held companies that own 10% or more of the stock of the Respondent.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, denying Petitioner's petition for rehearing, is unpublished and is reproduced at "Appendix A" of this Response. The decision of the United States Court of Appeals for the Eleventh Circuit, affirming the District Court's decision, is reported at 166 F.3d 354 and is reproduced at page 1a of the appendix of the petition. The opinion of the United States District Court for the Southern District of Georgia, Savannah Division, is unpublished and is reproduced at pages 2a through 23a of the appendix of the petition.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to entertain the petition. The Court of Appeals denied Petitioner's petition for rehearing on January 21, 1999, *not* February 17, 1998 as alleged by Petitioner. (Appendix A hereto; petition, p. 1). Petitioner did not file his Petition for Writ of Certiorari until April 23, 1999, 92 days later. As such, the petition was untimely filed and this Court has no jurisdiction over it. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.

STATEMENT OF THE CASE

This is a simple, straightforward case involving the application of undisputed facts to well-settled law. Indeed, this case involves the discharge of a 58-year-old male employee for repeated acts of misconduct and his labor union's subsequent decision not to arbitrate a meritless grievance filed under the collective bargaining agreement then in effect. Nevertheless, by misstating the facts and

distorting the record, Petitioner is hopeful this Court will divine an issue where none exists. However, as will be demonstrated, there is no cause for this Court's review of this case which involves neither a conflicting decision nor an erroneous finding.

The relevant facts are accurately set forth in the District Court's opinion at pages 3a through 10a of the appendix to the petition. Briefly, the events leading to Petitioner's discharge began on or about January 5, 1996 when Respondent received a customer complaint about Petitioner from the manager of a local bank.[1] The complaint involved Petitioner having followed a female bank employee in his company truck and having intimidated her by pulling alongside her personal vehicle and then telling her he had followed her to discover where she worked and to learn if she was married. (R1-20-50-52). After investigating the complaint, including obtaining Petitioner's version of the incident (which did not differ materially from the female bank employee's version), Respondent placed Petitioner on a 12-month probationary period, warned him that any such future misconduct could result in discharge, and issued him a disciplinary memorandum with a copy of Respondent's written ethics policy. (R1-20-52-56; R1-20-28-29; R1-20-59-66; R1-20-69-70; R3-22-39-54; R3-22-54-70).

On or about July 25, Respondent received another customer complaint about Petitioner. This complaint was from the security department at a Savannah hospital and involved Petitioner's following and generally bothering two female hospital employees in and about the hospital cafeteria and gift shop. As with the first complaint,

1. Hereinafter, all dates refer to 1996 unless otherwise noted.

Respondent investigated this second one by interviewing all parties involved, including both women, a uniformed hospital security officer, and the Petitioner. The women signed a written statement confirming that Petitioner had followed them about the hospital and made them extremely nervous. The hospital security officer confirmed the women's complaints; told of his confrontation with Petitioner at the hospital during which he requested that the latter leave the premises; and informed Respondent of yet another, similar complaint about Petitioner received from the security department at another local hospital. (R1-20-37-40; R1-20-29-30; R1-20-70-71; R1-20-94-97; R1-20-102-104; R1-20-43; R1-20-31).

Respondent then contacted the security department at the other Savannah hospital and was, in fact, informed of similar incidents involving Petitioner and two female hospital employees that had occurred there several months earlier. After obtaining this information, Respondent confronted Petitioner and, although he denied the female hospital employees' stalking accusations, he nevertheless admitted to having had a verbal confrontation with the security guard at the first hospital on or about July 25 and, further, to having been asked by the security department at the other hospital in May not to have lunch in their cafeteria in the future because of problems experienced with female employees at that hospital. (R3-22-70-88-91-121).

At the conclusion of this investigation, Respondent's human resources director made the decision to discharge Petitioner for having engaged in improper behavior towards female employees at both Savannah hospitals in violation of the terms of his January 1996 written warning and probation as well as Respondent's ethics policy. Petitioner's

employment was thus terminated effective July 31, 1996. (R1-20-30-31; R1-20-71; R1-20-75-76).

Present at Petitioner's July 31 termination meeting, at his own request, was the union's president, Bobby Long. President Long subsequently submitted a written grievance on Petitioner's behalf and, along with another union officer, conducted an independent investigation of the complaints made against Petitioner by the hospital personnel. In addition, President Long represented Petitioner at his August 26 grievance meeting with two vice presidents of Respondent (with no complaints from Petitioner), and then invited Petitioner to argue his own case for proceeding to arbitration under the labor agreement with Respondent before the union's five-member Executive Board. (President Long was not a member of that Board). Petitioner did so, but the Executive Board subsequently voted unanimously not to arbitrate his grievance based upon its analysis of the facts surrounding Petitioner's discharge and a reasoned determination that he would not prevail at arbitration. (R1-20-76-80; R1-20-85-87; R1-20-97-100; R1-20-40-41; R3-22-125-142; R3-22-144-163; R3-22-164-177). This decision was consistent with the union's practice of recent years not to arbitrate grievances the Executive Board considered meritless, even those of union members. (R1-20-80; R1-20-84-85).

Petitioner subsequently filed suit in District Court alleging that Respondent discharged him in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 612 *et seq.* (hereinafter "ADEA") and also in violation of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (hereinafter "LMRA"). (R1-1). After full discovery, Respondent moved for summary judgment as to Petitioner's

claims, which was subsequently opposed by his legal counsel. (R1-19-28). In May 1998, the District Court granted Respondent's summary judgment motion and dismissed all claims. (R2-35-36). Petitioner appealed this dismissal to the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1291. On December 15, 1998, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of Respondent by per curiam decision. Petitioner then filed a petition for rehearing which was denied by the Eleventh Circuit on January 21, 1999. On April 23, 1999, Petitioner filed the instant Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

In addition to the fact that the petition is jurisdictionally out of time, this case simply is not a proper case for which a writ of certiorari should be granted. As discussed below, the lower courts fully considered the undisputed record evidence and correctly applied well-established law to the issues. Moreover, the decision of the District Court does not conflict with controlling decisions of this Court, with the decisions of the Eleventh Circuit Court of Appeals, or with the decisions of other courts of appeals.

I.

THIS COURT LACKS JURISDICTION OVER THE PETITION

As an initial matter, the petition for writ of certiorari should be dismissed on jurisdictional grounds. Pursuant to 28 U.S.C. § 2101(c) and this Court's Rule 13, a petition for certiorari in a civil case must be filed within 90 days of the

entry of the judgment below or, if a petition for rehearing is timely filed, within 90 days of the denial of the petition for rehearing. In the instant case, Petitioner timely filed a petition for rehearing, which the Eleventh Circuit denied on January 21, 1999. (Appendix A hereto). Thus, the time to file a petition for writ of certiorari began to run on that date, making April 21, 1999 the *last* day on which a petition for writ of certiorari might be timely filed. However, Petitioner, did not file his petition until April 23, 1999. Inasmuch as the 90-day limit is "mandatory and jurisdictional," the Court must dismiss the petition for want of jurisdiction. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

II.

THE LOWER COURTS CORRECTLY DETERMINED THAT RESPONDENT WAS ENTITLED TO SUMMARY JUDGMENT ON PETITIONER'S AGE DISCRIMINATION CLAIM

A. The lower courts properly concluded that there was no direct evidence of age discrimination

Before the lower courts and here again, Petitioner argues that he presented *direct* evidence of age discrimination. This evidence consists of one alleged comment made to one employee, James Ray, sometime in 1995, and one alleged comment made to another employee, Hugh Reynolds, sometime in 1994. According to Mr. Ray, when he asked his manager why he was being transferred from one supervisory position to another within his department, he was told that since he "had turned 65 years old and . . . could retire at anytime[,] . . . [the company] wanted somebody else to get the feeling of the job."

(R6-32-5-8). The comment directed at Mr. Reynolds came from a company-approved doctor who allegedly told him during a 1994 physical examination that he would be eligible for early retirement in three years. (R7-33-5-6, 15-15, 23-24).[2]

This evidence does not amount to direct evidence of age discrimination in this case. These alleged statements did not involve the Petitioner or his July 31, 1996 discharge and were made, if at all, by persons who did not make or participate in the discharge decision.[3] Indeed, as this Court has recognized, "stray remarks in the workplace . . . , statements by nondecisionmakers, or statements made by decisionmakers unrelated to the decisional process itself" do not constitute direct evidence of discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring). To the contrary, direct evidence is "evidence, which if believed, proves [the] existence of [the] fact in issue without inference or presumption.

2. These two comments fall far short of establishing that "age discrimination was [the] common practice of the Employer," that "Mr. Ray was constantly reminded of his age and that he could retire and someone else could replace him," or that "older employees were being forced out of their positions if they did not accept the early retirement plan." (Petition, pp. 5, n.1, 8). Furthermore, the record evidence negates any such argument that Respondent was forcing out its older employees. As found by the District Court, of the fifteen employees eligible for early retirement in 1993 who, like Petitioner, were over the age of 55 and declined early retirement, nine were still working for Respondent four years later. (App. to Petition, pp. 14a-15a).

3. Human Resources Director Jim Melton made the discharge decision based on the investigation facts before him. Petitioner's manager merely signed his termination letter as the department head. (R1-20-30-31).

Evidence that merely suggests discrimination or that is subject to more than one interpretation does not constitute direct evidence." *Taylor v. Runyon*, No. 97-3202, Slip op., 1999 U.S. App. LEXIS 8412, *14 (11th Cir. May 4, 1999) (citation and quotation omitted). These statements clearly do not prove that Respondent discharged Petitioner because of his age. To be sure, they do not even suggest that this was the case. Accordingly, the lower courts properly determined that these alleged statements were not direct evidence.

B. The lower courts properly determined that Respondent met its burden of articulating a legitimate, nondiscriminatory reason for discharging Petitioner

In a circumstantial evidence case such as this one, the proof framework created by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny applies. *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (*McDonnell Douglas* provides proof scheme applicable to ADEA cases); *Walker v. NationsBank of Florida, N.A.*, 53 F.3d 1548, 1556 (11th Cir. 1995) (same). Thus, once Petitioner established a prima facie case, the burden shifted to Respondent to *articulate* a legitimate, nondiscriminatory reason for the discharge. *McDonnell Douglas*, 411 U.S. at 802. Clearly, notwithstanding Petitioner's contrary, unsupported assertion, Respondent met this exceedingly light burden. *See, e.g.*, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1980) (the defendant need only set forth the reasons for the decision; it need not persuade the court that it was actually motivated by the proffered reasons).

As stated by the District Court,

> [t]here is substantial, credible evidence that [Petitioner] had behaved inappropriately toward female employees of two local hospitals while on probation for a similar incident six months earlier. More importantly, however, [Respondent] has more than demonstrated a good faith belief that those incidents occurred and constituted good cause for [Petitioners's] termination.

(App. to Petition, p. 12a). In fact, as further noted by the District Court,

> [Respondent] has submitted affidavits from every member of [Respondent's] management involved with the decision to terminate [Petitioner], as well as from those individuals who investigated the incident, and the Union officials involved in the grievance process. Those affidavits, unrebutted by [Petitioner], conclusively establish a good faith belief on the part of [Respondent] that [Petitioner] had engaged in inappropriate behavior, and that such conduct formed the basis for his discharge.

(App. to Petition, p. 14a). There is no disputing the fact that Respondent met its burden of articulating a legitimate non-discriminatory reason for Petitioner's discharge.

C. The lower courts properly determined that Petitioner failed to produce any evidence of pretext

Having met its burden of production, the burden of demonstrating pretext fell to Petitioner. *See, e.g., Burdine*, 450 U.S. at 255. Yet, Petitioner failed to produce any evidence from which a reasonable factfinder could conclude that Respondent's legitimate, nondiscriminatory reason for his discharge was a mere pretext for age discrimination. In the courts below and in his petition, Petitioner simply asserts without any record or legal citation or argument that, because the complaints made against him were "false" and because he was subsequently replaced by someone 31 years of age, he has somehow demonstrated pretext. Petitioner, however, has misunderstood his burden.

Inasmuch as "the inquiry into pretext centers upon the employer's beliefs, and not the employee's own perceptions of his [behavior]," Petitioner's conclusory claims of innocence simply miss the point. *Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997); *see also O'Connor v. DePaul Univ.*, 123 F.3d 665, 670 (7th Cir. 1997) ("For purposes of the ADEA, we must not be concerned with whether the decision was right or wrong, fair or unfair, well-considered or precipitous. We must look only at whether the reason was discriminatory or, in the pretext analysis, whether it actually did underlie the plaintiff's termination."); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) ("The inquiry of the ADEA is limited to whether [the employer] believed that [the plaintiff] was guilty of harassment, and if so, whether this belief was the reason behind [the plaintiff's] discharge."). As so aptly found by the District Court, "[Petitioner's] contentions that the alleged misconduct did not occur . . . , even if true, fail to

provide evidence that [Respondent] did not believe in good faith that [Petitioner] had behaved inappropriately in violation of his probation." (App. to Petition, p. 14a). Thus, Petitioner's contentions fail to prove that Respondent was not motivated by the proffered reasons.[4]

As to his eventual replacement by a 31-year old female employee, although this fact may have enabled him to establish a prima facie case, it does not tend to show that the reason given by Respondent was not the true reason for his discharge. This is especially true since the terms of the collective bargaining agreement between Respondent and the union dictated that Petitioner's vacant position would be filled by the most senior, qualified applicant from the bargaining unit and, further, since the discharge

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4. The same is true with respect to Petitioner's assertions that the womens' complaints were not supported by sworn affidavits, that one of the complaints was later recanted, and that the incidents involved women with whom Petitioner had had a relationship. (Petition, p. 10). The complaining women at the first hospital were interviewed and two of them provided a signed statement confirming their complaints. (R1-20-43; R1-20-31). In any event, the fact that affidavits were not obtained simply is irrelevant to the inquiry of whether Respondent believed their accusations. Likewise, whether or not one or more of the women later recanted or had been personally involved with Petitioner has no bearing on the issue inasmuch as there is absolutely no evidence to support these alleged facts and no evidence or even assertion that Respondent was aware of these alleged facts. Furthermore, even if true, these facts would not prove that Respondent did not, in fact, believe that Petitioner engaged in inappropriate conduct, especially in light of his admissions that he did follow and question the bank employee and that he was asked by security personnel at both hospitals to leave the premises due to his misconduct. (R2-29-1-10; R1-21-4).

decisionmaker (Melton) did not even know who or how old that successful applicant might be. (R4-30-21-25; R5-31-21-22). Thus, the age of Petitioner's replacement has no relevance whatsoever to the question of the decisionmaker's motive or the real reason for the discharge.

In the end, Petitioner simply failed to produce any relevant evidence that even remotely suggests that the complaints against him by the hospital personnel were not what actually motivated Respondent to discharge him.[5] Indeed, he does not dispute that the complaints were made; does not dispute that Respondent investigated the complaints; does not dispute many of the substantive complaint allegations, such as his presence at the various bank and hospital locations, interaction with the complaining women, and security officers' requests that he leave their respective hospital premises due to his seemingly inappropriate actions; and does not dispute that he was on disciplinary probation with Respondent for engaging in similar misconduct only six months earlier. Nor does Petitioner allege or establish that similarly-situated younger employees were treated more favorably by Respondent.[6]

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5. Petitioner claims that he did not have an adequate opportunity to demonstrate pretext in the courts below, yet he fails to explain what opportunities he was denied. (Petition, p. 12). He was represented by legal counsel throughout the proceedings; he was afforded ample discovery and, in fact, engaged in the discovery process; he submitted a written response and deposition testimony in opposition to Respondent's motion for summary judgment; and the lower courts considered his arguments and record "evidence." Clearly, he was given ample opportunity to discover and present evidence of pretext if any such evidence existed.

6. In fact, the only other employee found to have violated Respondent's ethics policy in 1996 was likewise discharged. He was 34 years of age at that time. (R1-20-31-32).

Thus, the lower courts properly determined that Petitioner "failed to present evidence sufficient to cast doubt upon [Respondent's] legitimate, non-discriminatory reason." (App. to Petition, p. 17a). Accordingly, summary judgment was appropriately entered on his age claim. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (to survive a properly supported motion for summary judgment, the plaintiff must present "affirmative evidence" from which a jury might return a verdict in his favor); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

D. The lower courts properly analyzed this case under the McDonnell Douglas evidentiary framework

Petitioner argues that this Court should grant his petition for writ so as to determine whether "Title VII's McDonnell Douglas framework is applicable to ADEA cases." (Petition, p. 11). He concedes that courts have assumed that it does so, and, of course, federal courts, including this Court, have consistently so held. *See, e.g., O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996) ("In assessing claims of age discrimination brought under the ADEA, the Fourth Circuit, like others, has applied some variant of the basic evidentiary framework set forth in McDonnell Douglas.") (footnote omitted); *Hazen Paper Co.*, 507 U.S. at 604 (applying McDonnell Douglas proof scheme to ADEA case). This is so because "[t]he ADEA and Title VII share common substantive

features and also a common purpose." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995). In fact, "the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Thus, it is only logical that the same basic burdens and presentation of proof apply to ADEA cases. Afterall, the ultimate issue in such cases is the same: did the defendant intentionally discriminate against the plaintiff. The lower courts, therefore, consistent with settled law and sound policy, properly applied the *McDonnell Douglas* proof scheme to the instant case. *See, e.g., Hazen Paper Co.*, 507 U.S. at 604; *Walker*, 53 F.3d at 1556.

In fact, Petitioner has failed to explain why a different evidentiary framework should be applied or how he has been harmed by the application of the *McDonnell Douglas* framework to his case. To be sure, there is no cause for this Court to address this novel and completely undeveloped issue, which was never raised below and which is not supported by any legal authority.

III.

THE LOWER COURTS CORRECTLY DETERMINED THAT RESPONDENT WAS ENTITLED TO SUMMARY JUDGMENT ON PETITIONER'S SECTION 301 CLAIM

To establish his Section 301 claim under the LMRA, Petitioner was required to prove both that his discharge was a violation of the collective bargaining agreement and that the union breached its duty of fair representation. *E.g., Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). As the lower

courts found, although the evidence supporting a breach of contract is "tenuous at best," the evidence supporting a breach of the duty of fair representation is entirely lacking. (App. to Petition, p. 18a). Nevertheless, just as he did before the lower courts, Petitioner is arguing that the union breached its representation duty by failing to arbitrate his grievance allegedly due to his lack of membership status and President Long's personal animosity towards him. (Petition, pp. 15-14). However, there is simply no evidence to support his theories.

As an initial matter, the union's failure to arbitrate Petitioner's grievance does not in itself constitute a breach of its duty of fair representation. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967) (the duty does not provide an employee with the absolute right to have any grievance taken to arbitration). In fact, it has long been recognized that

> in its role as the exclusive agent for all employees in the bargaining unit, the union has the power to sift out frivolous grievances, to abandon processing of a grievance which it determines in good faith to be meritless and to settle disputes with the employer short of arbitration.

Harris v. Chemical Leaman Tank Lines, Inc., 437 F.2d 167, 171 (5th Cir. 1971); *see also Seymour v. Olin Corp.*, 666 F.2d 202, 208 (5th Cir. 1982) ("[T]he duty of fair representation is not a straightjacket which forces unions to pursue grievance remedies under the collective bargaining agreement in every case where an employee has a complaint against the company."). To the contrary, "[a] breach of the statutory duty of fair representation occurs only when a

union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190.

As to Petitioner's allegation that the union discriminated against him based on his membership status, the evidence refutes any such notion. Indeed, the

> uncontroverted evidence demonstrat[es] that [Petitioner's] non-membership was not even discussed or considered when the Executive Board voted unanimously not to arbitrate the grievance. (Clearman Aff. 5-6; Hyslop Aff. Par 5; Pl's Resp. Ex. K). Rather, that decision was based on the Board's evaluation of [Petitioner's] claim, following the Union's independent investigation of [Respondent's] termination decision and [Petitioner's] presentation to the Board. (Clearman Aff.; Hyslop Aff.; Pl.'s Resp. Ex. K).

(App. to Petition, p. 20a).

Likewise, there is no evidence to support the allegation that Petitioner was denied arbitration because of President Long's feelings toward him. In fact, notwithstanding Petitioner's contrary unsupported assertions (Petition, pp. 6 n.2, 14), there is no evidence that President Long harbored ill feelings toward Petitioner at all. Even Petitioner conceded that the two men had had no problems since a particular incident in 1992 or 1993 and that he expressly requested President Long's involvement in the grievance process on and after July 31, 1996. (R3-22-30-35-126-142). In any event, even assuming the existence of an acrimonious

relationship between Long and Petitioner, there still exists no evidence that said relationship was the reason for the Executive Board's decision not to arbitrate his grievance. As put by the District Court,

> such an assumption does not allow the Court to infer a conspiracy among the Executive Board members, who voted unanimously not to arbitrate [Petitioner's] grievance without Long. Long did not participate in that vote.

(App. to Petition, p. 19a). Here again, the uncontroverted evidence establishes that President Long's personal feelings played no role in the union's decision not to arbitrate.[7]

The District Court and Court of Appeals thus correctly determined that Respondent was entitled to summary judgment on Petitioner's Section 301 claim. The evidence, rather than establishing a breach of duty, establishes only that the union, consistent with its practice, decided not to arbitrate a meritless grievance after independently investigating the factual circumstances that resulted in the discharge and subsequent grievance; after properly processing the grievance pursuant to the labor agreement; and after weighing all of the evidence before voting unanimously not to arbitrate.

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7. Petitioner also makes the bald assertion that he "was forced to agree to have several of the grievance processes combined in exchange for an arbitration hearing." (Petition, p. 14). He cites no evidence to support this claim and has not refuted President Long's and Board Member Clearman's affidavit testimony to the contrary. (R1-20-78-79; R1-20-85-86). Nor does he explain why he made a presentation to the Executive Board urging the members to vote to proceed with arbitration if he already had been assured of arbitration by President Long. The lower courts properly dismissed this frivolous allegation.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 21, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-08739

JOHN C. BRAZELL,

Plaintiff-Appellant,

versus

SAVANNAH ELECTRIC AND POWER COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: BIRCH, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant JOHN C. BRAZELL is denied.

ENTERED FOR THE COURT:

s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE